No. 18-60606

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF TEXAS; GREG ABBOTT, GOVERNOR OF TEXAS; TEXAS COMMISSION ON ENVIRONMENTAL QUALITY; SIERRA CLUB,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY ANDREW WHEELER, Acting Administrator, of the United States Environmental Protection Agency,

Respondents,

Petition for Review of Final Administrative Actions of the United States Environmental Protection Agency

INITIAL BRIEF OF APPELLANT SIERRA CLUB

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Dated: November 26, 2018

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and ANDREW WHEELER, Administrator, United States Environmental Protection Agency,

Respondents,

SIERRA CLUB and ENVIRONMENTAL DEFENSE FUND,

Respondent-Intervenors.

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Petitioners: State of Texas; Greg Abbott, Governor of Texas; Texas Commission on Environmental Quality.

2. Counsel for Petitioners State of Texas; Gregg Abbott, Governor of Texas; and Texas Commission on Environmental Quality: Ken Paxton, Attorney General of Texas; Jeffrey C. Mateer, First Assistant

Attorney General of Texas; Kyle D. Hawkins, Solicitor General; Bill L. Davis, Assistant Solicitor General; David J. Hacker, Special Counsel for Civil Litigation; Craig James Pritzlaff, Assistant Attorney General.

3. Petitioner-Respondent Intervenor: Sierra Club. Sierra Club is a non-profit organization that maintains an open membership invitation to organizations, businesses, individuals, and the public in general. Accordingly, Sierra Club consists of many individual members. Sierra Club does not have any parent companies, and no publicly-held company owns a 10% or greater interest in Sierra Club.

4. Counsel for Sierra Club: Joshua D. Smith with Sierra Club; David Baake with Baake Law, LLC.

5. Respondents: U.S. Environmental Protection Agency; Andrew Wheeler, Administrator, U.S. Environmental Protection Agency.

6. Counsel for Respondents U.S. Environmental Protection Agency and Andrew Wheeler: Jeff Sessions, Attorney General of the United States; Matthew Leopold, U.S. Environmental Protection Agency; Amanda Shafer Berman, U.S. Department of Justice.

7. Respondent-Intervenor: Environmental Defense Fund ("EDF").

8. Counsel for EDF: Peter Zalzal and Rachel Fullmer with EDF; Sean Donahue with Donahue, Goldberg & Weaver, LLP.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Local Rule 28.2.3, Petitioner Sierra Club respectfully requests that the Court hold argument in this case. At issue is whether the U.S. Environmental Protection Agency is required under the Clean Air Act to designate areas of Texas as being in "nonattainment" with the health-based 2015 National Ambient Air Quality Standard for ozone pollution when emissions from those counties "cause or contribute" to actual monitored violations of the ozone standard, causing respiratory illness and even premature death. Petitioners respectfully submit that oral argument would assist the Court with the complex legal issues and the voluminous evidentiary record in this case.

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JURISDICTIONAL STATEMENT

This petition for review challenges the EPA Administrator's final national rulemaking designating, among other areas of the country, the eight-county San Antonio area as being in "attainment" or "nonattainment" with the with the 2015 health-based National Ambient Air Quality Standard ("NAAQS") for ground-level ozone (commonly known as smog). *Additional Air Quality Designations for the 2015 Ozone National Ambient Air Quality Standards —San Antonio, Texas Area*, 83 Fed. Reg. 35,136 (July 25, 2018).[1]

Under the Clean Air Act, the circuit courts have subject matter jurisdiction over timely-filed petitions for review of the Administrator's final action. 42 U.S.C. § 7607(b)(1). Sierra Club filed this petition for review on September 24, 2018, within 60 days of the final rule's publication in the Federal Register on July 25, 2018, and therefore this Court has jurisdiction over the petitions for review.

Under 42 U.S.C. § 7607(b)(1), however, "nationally applicable regulations" or final actions "based on a determination of nationwide scope and effect" must be filed only in the D.C. Circuit Court of Appeals. The designations at issue are part of the 2015 Ozone Designations Rulemaking, a nationally applicable regulation

[1] EPA Docket captioned *Air Quality Designations and Classifications for the 2015 Ozone Standards*, EPA Docket No. EPA-HQ-OAR-2017-0548; *see also Air Quality Designations for the 2015 Ozone National Ambient Air Quality Standards (NAAQS)*, 82 Fed. Reg. 54,232 (Nov. 16, 2017); *Additional Air Quality Designations for the 2015 Ozone National Ambient Air Quality Standards* 83 Fed. Reg. 25,776 (June 4, 2018).

which spans the entire country. *See* EPA Docket No. EPA-HQ-OAR-2017-0548. Additionally, as discussed below, EPA arbitrarily failed to publish a finding that this final action is based on a determination of nationwide scope and effect, as the agency did for every other area of the country. *See* 82 Fed. Reg. at 54,234-35; 83 Fed. Reg. at 25,783. Because the San Antonio Designations are part of a "nationally applicable regulation," and a final action that is, in fact, based on a determination of nationwide scope and effect, venue is proper in the D.C. Circuit, not here. *See* 42 U.S.C. § 7607(b)(1).

STATEMENT OF ISSUES

1. Under the Clean Air Act, 42 U.S.C. § 7607(b)(1), is this Court the proper venue for the review of a portion of a "nationally applicable" Clean Air Act regulation, which that spans the entire country and is based on the same administrative record, methodology, and nationally applicable guidance and legal interpretations as the regulation governing the rest of the country?

2. Under the Clean Air Act, 42 U.S.C. § 7407(d), was EPA required to designate Atascosa, Comal, and Guadalupe Counties, Texas as "nonattainment" for the 2015 National Ambient Air Quality Standard for Ozone, when available information demonstrated those areas "contribute[]" to non-attainment "in a nearby area"?

INTRODUCTION

This case involves EPA's unlawful failure to designate Atascosa, Comal, and Guadalupe Counties, Texas as being in "nonattainment" with the health-based 2015 National Ambient Air Quality Standard ("NAAQS") for ground-level ozone (commonly known as smog).[2] Under the Clean Air Act, EPA is required to designate as nonattainment any area that is violating a NAAQS standard, and any area "that *contributes* to ambient air quality in a nearby area that does not meet" the NAAQS. 42 U.S.C. § 7407(d)(1)(A)(i) (emphasis added). Texas's own certified monitoring data demonstrates that air quality in Bexar County is violating—*i.e.*, does not meet—the ozone standard, and was therefore required to be designated as nonattainment.

Although Atascosa, Comal, and Guadalupe Counties do not have certified air monitors, the record, including Texas's own air dispersion modeling, makes clear that these counties are responsible for pollution that contributes to violations of the ozone standard in Bexar County. *See* C.I. No. 0297 at 6-4 to 6-6. Consequently, in addition to Bexar County, EPA was required to designate Atascosa, Comal, and Guadalupe Counties as being in nonattainment. The agency's arbitrary failure to designate those areas as nonattainment puts the health and welfare of San Antonio area residents, including Sierra Club members, at risk.

[2] *See* National Ambient Air Quality Standard for Ozone, 80 Fed. Reg. 65,292 (Oct. 26, 2015) ("2015 ozone NAAQS").

If the Court determines that this case is properly before it (as explained below, it is not), the Court should vacate EPA's decision with respect to Atascosa, Comal, and Guadalupe Counties.

STATEMENT OF THE CASE

I. THE OZONE NAAQS AND HUMAN HEALTH

Ozone, the main component of urban smog, is a corrosive pollutant formed by the reaction of volatile organic compounds ("VOCs") and oxides of nitrogen ("NOx") in the atmosphere in the presence of sunlight. 80 Fed. Reg. at 65,302-04. Those precursor emissions are emitted by many types of pollution sources, including power plants, industrial emissions sources, and motor vehicles. Exposure to ozone, for even short time periods, can have significant human health impacts, including the aggravation of asthma attacks and cardiovascular and respiratory failure, leading to increased hospitalizations and premature death. Children, the elderly, and adults with asthma are particularly at risk. *Id.* at 65,304.

To protect against these significant public health threats, EPA is required to periodically review and revise the NAAQS based on new scientific information. 42 U.S.C. § 7409(d)(1). In 2015, EPA issued a new eight-hour ozone standard that is more protective of human health than the old standard and will deliver substantial health benefits.[3] Nationwide, implementation of the standard would prevent up to

[3] 80 Fed. Reg. at 65,453 (codified at 40 C.F.R. § 50.19).

878 premature deaths, thousands of asthma attacks, and tens of thousands of lost school and work days *every* year, resulting in $5.8 billion dollars in avoided public health costs and lost productivity.[4]

II. IMPLEMENTATION OF THE NAAQS

Bringing the entire country expeditiously into compliance with health-protective ambient air quality standards is the "heart" of the Clean Air Act. *Ala. Power Co. v. Costle*, 636 F.2d 323, 346 (D.C. Cir. 1979). EPA's promulgation of the 2015 ozone NAAQS triggered statutory deadlines to "designate" all areas of the country as either meeting or failing the standard. Within one year of EPA's issuance of the standard, each state was required to submit to EPA a list of recommended designations for all areas (or portions thereof) in the state as nonattainment, attainment, or unclassifiable. 42 U.S.C. § 7407(d)(1)(A). EPA was then required to issue final designations for all areas of the country "as expeditiously as practicable, but in no case later than 2 years from the date of promulgation of the new or revised [NAAQS]"—in this case, by October 2017. *Id.* § 7407(d)(1)(B)(i).

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[4] C.I. No. 0357 at 2 (citing EPA, Regulatory Impact Analysis of the Final Revisions to the National Ambient Air Quality Standards for Ground-Level Ozone, at tbls. ES-5 through ES-10, https://www.epa.gov/sites/production/files/2016-02/documents/20151001ria.pdf).

This brief cites to the record using the following format: "C.I. No. XXXX at Y," with XXXX referring to the final four digits of the "Document ID" number on EPA's October 9, 2018 Certified Index ("C.I.") (ECF No. 00514674116), and Y referring to the pinpoint page number.

The Act requires an area to be designated as being in "nonattainment" if it is violating the standard or "contributes to ambient air quality in a nearby area that does not meet" the standard. 42 U.S.C. § 7407(d)(1)(A)(i). An attainment area is "any area" that currently "meets" the standard. *Id.* § 7407(d)(1)(A)(ii). An unclassifiable area is "any area that cannot be classified on the basis of available information as meeting or not meeting" the NAAQS. *Id.* § 7407(d)(1)(A)(iii).

EPA's final area designations determine the types of measures that states must include in their state implementation plans ("SIPs"). If an area is designated as being in "attainment" or "unclassifiable," the state is required only to prevent significant deterioration of air quality. *Id.* § 7410(a)(1)-(2). If an area is designated "nonattainment," however, the state must submit a SIP with additional requirements, including more stringent "new source" permitting rules and provisions that, in some cases, require existing sources to install reasonably available control technology to reduce pollution. *Id.* §§ 7502, 7503, 7511-7511a.

III. EPA'S NATIONAL FIVE-FACTOR NONATTAINMENT DESIGNATION PROCESS

After finalizing the 2015 Ozone NAAQS, EPA began the process of designating areas of the country as either attainment, nonattainment, or unclassifiable for this standard. On February 25, 2016, EPA issued a nationally-applicable Designation Guidance document for states, tribal agencies, and EPA to

use in developing recommended designations under 42 U.S.C. § 7407(d)(1)(A).[5] That guidance document sets out a uniform, iterative process by which EPA must evaluate and determine nonattainment boundary designations throughout the country.

Under the guidance, the designation process for every area of the country is informed by five factors: air quality data, emissions and emissions-related data, meteorology, geography/topography, and jurisdictional boundaries. At the first step, EPA determines whether an area has state-certified air quality monitoring data that shows a violation of the standard.[6] If it does, EPA must designate the area as nonattainment. C.I. No. 0061, Attach. 3 at 4-5.

If a violating monitor is identified, EPA proceeds to the remaining steps to determine whether emissions from any nearby areas *contribute* to violations of the standard; if they do, these areas must also be designated as nonattainment *See* C.I.

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[5] *See generally* C.I. No. 0061 (Memorandum from Janet G. McCabe, Acting Assistant Administrator, to Regional Administrators, Regions 1-10, titled, "Area Designations for the 2015 Ozone National Ambient Air Quality Standards" (Feb. 25, 2016) (hereinafter, "Designations Guidance")); *see also* 83 Fed. Reg. at 35,138 (states are to use Designations Guidance in making recommendations).

[6] The standard is violated when "the most recent complete three consecutive calendar years" of state-certified monitoring data shows that the annual fourth-highest daily maximum 8-hour average O_3 concentration exceeds 0.070 ppm, as determined in accordance with EPA regulations. 40 C.F.R. pt. 50 app. D (nationally applicable methods for measuring and calculating ambient ozone concentrations, and calibrating monitoring stations).The only exception exists where a state submits, and EPA approves, an exceptional event petition under 42 U.S.C. § 7619.

No. 0061 (citing 42 U.S.C. § 7407(d)(1)(A)(i)). Because ozone and its precursors are "readily transported" across geographic areas, EPA considers a "relatively broad geographic area" in determining which areas contribute to a violation. *Id.* at 5. In general, EPA considers each of the counties adjacent to—and connected with—any area with a violating monitor.[7] These broader geographic areas are not presumed to be the nonattainment boundary, but provide context for identifying and evaluating emission sources and trends, population growth, and traffic and commuting patterns in any particular metropolitan area and its surrounding communities. *Id.* at 6.

The third step considers meteorological data "to assess the fate and transport of emissions." *Id.* at 7. EPA frequently uses the Hybrid Single Particle Lagrangian Integrated Trajectory ("HYSPLIT") modeling system to produce "trajectories that illustrate the 3-dimensional paths traveled by air parcels to a violating monitor." *Id.* HYSPLIT modeling provides an estimate of the path specific pollution plumes took before reaching a monitor at a specific location and time. HYSPLIT models thus allow EPA to determine which potential areas and emission sources may have contributed to the monitored violation. *Id.* at 7-9.

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[7] EPA refers to these broader geographic areas as "Combined Statistical Areas" or "Core Based Statistical Areas," which generally consist of the county or counties associated with an "urban core, plus adjacent counties having a high degree of social and economic integration." C.I. No. 0061 at 5-6.

The fourth step examines "physical features of the land that might define the airshed." *Id.* at 10. For example, "[m]ountains or other physical features may influence the fate and transport of emissions as well as the formation and distribution of ozone concentrations." *Id.* In addition, "valley-type topographical features can cause local stagnation episodes where vertical temperature inversions effectively 'trap' air pollution." *Id.* At the fifth step, "existing jurisdictional boundaries may be considered for the purpose of providing a clearly defined legal boundary" and ensuring "meaningful air quality planning and regulation." *Id.* at 10-11.

After EPA has considered all five factors, it weighs the factors together and "use[s] a weight-of-the-evidence approach" to determine which areas should be included in the nonattainment area. *Id.* at 11. "The guiding principle for this evaluation should be to include, within the boundaries of the nonattainment area, nearby areas with emissions of ozone precursors (NOx and VOC) that contribute to the violating monitor on days that exceed the NAAQS." *Id.*

IV. EPA'S NATIONAL DESIGNATION RULEMAKING

On November 6, 2017, EPA issued its first round of area designations, which covered many areas of the country, but failed to include most major population centers, and notably contained no "nonattainment" areas. 82 Fed. Reg. 54,232. Because EPA failed to timely issue final designations for the remainder of

the country, a coalition of environmental and health organizations, including Sierra Club and Environmental Defense Fund, filed a lawsuit to compel the agency to fulfill its statutory duty to designate all areas of the country within two years of issuing the 2015 ozone NAAQS. *In re Ozone Designation Litigation,* No. 4:17–cv–06900 (N.D. Cal. filed Dec. 4, 2017).

On March 12, 2018, the district court ordered EPA to finalize its national designation rulemaking. *See* Order Granting Mot. for Summ. J., *In re Ozone Designation Litigation*, No. 4:17-cv-06900 (N.D. Cal. Mar. 12, 2018), ECF No. 72. Because EPA represented that it needed more time to consider information submitted by the State of Texas, the court allowed the agency additional time to complete its designations for the counties in the San Antonio area. *Id.* at 9, 13.

On June 4, 2018, EPA published its final designations for all nonattainment areas outside the San Antonio area. 83 Fed. Reg. 25,776. The next month, on July 25, 2018, EPA published its final designations for the San Antonio area. 83 Fed. Reg. 35,136 ("San Antonio Designations"). EPA designated Bexar County, where San Antonio is located, as nonattainment, while designating the seven counties surrounding Bexar County as "attainment" or "unclassifiable."

V. SAN ANTONIO DESIGNATIONS

As noted, following EPA's issuance of the 2015 ozone NAAQS, states were required to submit initial designations within one year—*i.e.*, by October 1, 2016. In

its initial submissions for the San Antonio area, Texas recommended that EPA designate Bexar County as being in *nonattainment* because two of the regulatory monitors in that county showed violations of the standard. C.I. No. 0046 at A-1 and B-1. Because the surrounding counties—Atascosa, Bandera, Guadalupe, Comal, Kendall, Medina, and Wilson Counties—do not have certified regulatory monitors, Texas proposed to designate all of those counties as being in attainment or unclassifiable.

On September 27, 2017, however, Texas submitted a letter urging EPA not to move forward with the nonattainment designation for Bexar County. C.I. No. 0214. On January 19, 2018, EPA sent a letter to the Governor of Texas asking whether he intended the September 27, 2017 letter to serve as a revision to the state's initial recommendations. C.I. No. 0428 at 1. On February 28, 2018, Texas responded, urging the EPA to designate Bexar County as attainment. *Id.* In support, Texas provided Comprehensive Air Quality Modeling ("CAMx") photochemical source-apportionment modeling, which purports to show that air quality would improve on its own within five to ten years due, in large part, to a variety of projected and unenforceable emission reductions. *See, e.g.*, C.I. No. 0297, App. A at v and 5-1.

As discussed, however, under plain language of section of the Clean Air Act, EPA is required to designate as nonattainment any area that "does not meet" the

ozone standard. 42 U.S.C. § 7407(d)(1)(A)(i). And as described in EPA's nationally-applicable Designation Guidance, the Act requires EPA to designate as nonattainment any area that is currently violating the standard based on state-certified, quality-assured monitoring data that meets EPA standards. C.I. No. 0427 at 4; C.I. No. 0428 at 6-7. The agency evaluates attainment using the most recent, consecutive three-year period of quality-assured, state-certified air quality data. In accordance with federal regulations, 40 C.F.R. § 58.15, states are required to certify their air monitoring data for the previous year by May 1 of each year.

On May 1, 2018, Texas certified their 2017 data. C.I. No. 0428 at 7. Using the most recent, three-year period of state-certified data available (*i.e.*, 2015-2017), Texas's own monitoring data demonstrated violations of the ozone NAAQS at two of the three regulatory monitors in Bexar County: the Camp Bullis and Northwest monitors. *Id.* at 6-7. The same two monitors showed violations of the NAAQS using 2014-2016 monitoring data. *Id.*[8] Because these monitors are "in violation" of the 2015 ozone standard, C.I. No. 0297, App. A at ii, EPA was required to designate Bexar County as being in nonattainment.

Because the counties surrounding Bexar County do not have any certified air quality monitors, EPA proceeded to conduct a five-factor, weight of the evidence analysis, as required by the national Guidance Document, to determine whether

[8] Texas's CAMx source-apportionment modeling report confirms that the Bexar County is "in violation" of the NAAQS. C.I. No. 0297, App. A at ii.

any of those counties contribute to violations of the ozone standard in Bexar. *See generally* C.I. No. 0428. EPA noted that Atascosa County had the second-highest NOx and VOC emissions in the area, behind only Bexar. These emissions are primarily due to the on-road transportation sectors and pollution from one major source—a large coal-burning coal plant. *Id.* at 21. Comal and Guadalupe Counties have the third and fourth largest NOx and VOC emissions in the area. *Id.*

EPA noted numerous HYSPLIT trajectories showing that pollution originating in Atascosa, Comal, and Guadalupe Counties impacted the violating monitors in Bexar County. *Id.* In addition, Texas's own CAMx source apportionment modeling estimated that Atascosa and Guadalupe Counties each accounted for between 6 and 8% of the ozone contributions to violating monitors on high ozone days. *Id.* at 21-22; C.I. No. 0297 at 6-4 to 6-6. Although the seven counties surrounding Bexar are responsible for over one-third of the total ozone-causing VOC and NOx emissions in the area, EPA designated all of those areas as being in attainment or unclassifiable. *Id.* at 10, 21.

VI. REDUCING OZONE LEVELS IN THE SAN ANTONIO AREA WOULD RESULT IN SIGNIFICANT PUBLIC HEALTH AND ECONOMIC BENEFITS.

In 2018, an American Lung Association report found that San Antonio was the twenty-seventh most ozone-polluted city in the United States. C.I. No. 0357 at 4. San Antonio's unhealthy air quality has consequences for the more than 1.9

million Texans who live in Bexar County, including approximately 58,767 children and 168,266 adults suffering from asthma. *Id.*

Recent epidemiological studies suggest that even modest reductions in ozone levels, which could be achieved by reducing pollution from a handful of large sources, would save hundreds of millions of dollars in avoided public health costs, premature deaths, and lost work and school days in the San Antonio area. Indeed, a recent report, conducted using an EPA-approved modeling platform, concluded that compliance with the 2015 ozone NAAQS would prevent 24 premature deaths each year in Bexar County alone, resulting in approximately $220,000,000 in avoided public health costs. C.I. No. 0356, Ex. A. The study also estimated that a modest drop in ozone levels would prevent over 38,000 lost school and work days annually in the San Antonio area. *Id.*

VII. CHALLENGES TO EPA'S SAN ANTONIO DESIGNATIONS

As discussed, the district court allowed EPA additional time to complete the designations for the eight-county San Antonio area. This has created confusion about the proper venue for challenging these designations. For all areas of the country except the San Antonio area, EPA explicitly concluded that the national ozone designations were all part of a "nationally applicable regulation." 82 Fed. Reg. at 54,234; 83 Fed. Reg. at 25,783. EPA further concluded that the designations were "based on determinations of nationwide scope and effect"

because "the core of this rulemaking is the EPA's interpretation of the designation provisions in Section 107(d)(1) of the CAA, and its application of that interpretation to areas across the country." 82 Fed. Reg. at 54,234-35; 83 Fed. Reg. at 25,783. These determinations require any petition for review of the designation rule to be filed in the D.C. Circuit. Accordingly, several petitioners have filed challenges to EPA's nationwide ozone designations in the D.C. Circuit.[9]

Unlike the notice accompanying every other ozone designation in the country, however, the notice accompanying the San Antonio Designations failed to indicate EPA's view on the proper venue for judicial challenges. 83 Fed. Reg. at 35,140 (stating that judicial review is available "in the U.S. Court of Appeals for the appropriate circuit"). Texas Petitioners have taken the position that venue is proper in this Circuit. Because the San Antonio Designations are part of a "nationally applicable regulation," Sierra Club contends that venue is proper in the D.C. Circuit. These parties have filed four separate petitions for review, with each party filing one in the D.C. Circuit and one in this Court.[10]

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[9] The consolidated petitions concern designations in at least seven states, including designations in Texas. *See Clean Wis. v. EPA*, No. 18-1203 (D.C. Cir. filed Aug. 3, 2018).

[10] *See Sierra Club v. EPA*, No. 18-1262 (D.C. Cir. filed Sept. 21, 2018) (consolidated with No. 18-1263).

SUMMARY OF THE ARGUMENT

Throughout this rulemaking, EPA has given Texas special treatment in an effort to avoid the inescapable conclusion that the San Antonio area is violating public-health safeguards that protect against harmful ozone pollution. Indeed, in response to Texas's vague and conclusory assertions that additional data *could* warrant an attainment designation for the San Antonio area, EPA took the unprecedented step of bifurcating the San Antonio area from the designation timeline for the rest of the country to allow Texas additional time to provide unknown information that might support the conclusion that San Antonio was, in fact, meeting the standard. Instead of providing any relevant information about *current* air quality—*i.e.*, whether San Antonio meets the NAAQS—Texas produced a modeling report projecting future air quality conditions based on a variety of optimistic and unenforceable pollution reductions. Because Texas-certified monitoring data demonstrates that Bexar County is violating the ozone standard, EPA designated the area as nonattainment.

EPA's delay in finalizing the San Antonio area designations has created uncertainty about the proper venue for challenging the agency's final designations. Under section 7607(b)(1) of the Clean Air Act, challenges to "nationally applicable regulations" or final actions "based on a determination of nationwide scope or effect" may be filed only in the D.C. Circuit Court of Appeals. In issuing its final

designations for *every other* area of the country, EPA explained that its 2015 ozone designation rulemaking was a nationally applicable regulation because the "core of the rulemaking" involved EPA's interpretation of the designation provisions of the Clean Air Act. 82 Fed. Reg. at 54,233-34; 83 Fed. Reg. at 25,778, 25,783. For that same reason, EPA also determined that those "the final designations are of nationwide scope and effect." *Id.*

In its final designations for the San Antonio area, however, EPA departed without explanation from those findings. But as explained below, San Antonio Designations are unquestionably part of the *same* "nationally applicable regulation." Indeed, the designations are based on the same administrative record, the same methodology, and the same nationally applicable guidance and legal interpretations as the designations for the rest of the country. And all of these designations are organized in the same rulemaking docket and codified in the same section of the Code of Federal Regulations. Moreover, EPA arbitrarily failed to publish a finding that the San Antonio Designations were based on the same determinations of nationwide scope and effect as every other designation in the country. As a result, these petitions for review should be consolidated for review in the D.C. Circuit, so as to ensure national uniformity.

EPA's special and arbitrary treatment of San Antonio extended to the substance of the agency's final designations. Section 107(d) of the Clean Air Act

requires EPA to designate as nonattainment any area that it violating the pertinent standard, as well as any nearby areas that "*contribute*" to the violation. 42 U.S.C. § 7407(d)(1)(A)(i). In making its final designations, EPA departed, without explanation, from the agency's previous interpretations of the pollution impacts that constitute "contribution" to downwind nonattainment. EPA's interpretation of the term "contribution" is not only inconsistent agency's past practice, but contrary to the structure and purpose of the Clean Air Act. Moreover, EPA's approach to the San Antonio area designations was arbitrarily inconsistent with the agency's previous designations for other parts of Texas, where EPA finalized designations based on source-apportionment modeling demonstrating pollution impacts exceeding EPA's previously-relied upon contribution threshold.

EPA also failed to examine the available information and articulate a rational explanation for its decision not to designate Atascosa, Comal, and Guadalupe Counties as "nonattainment." Specifically, although there is significant evidence that the counties surrounding San Antonio are "contributing" to violations of the ozone standard, EPA failed to designate those areas as nonattainment merely because they are responsible for less pollution. Moreover, although the counties surrounding San Antonio do not have certified regulatory monitors showing violations of the standard, EPA essentially ignored the possibility that air quality in those areas is unsafe. EPA also set the bar for

"contribution" improperly high, and concluded that none of the areas surrounding San Antonio contribute to nonattainment even though those areas are responsible for nearly a third of the total ozone-causing pollution in the San Antonio area. All of these factors indicate that EPA should have designated Atascosa, Comal, and Guadalupe Counties as contributing counties, and EPA's decision to the contrary was arbitrary and capricious.

STANDARD OF REVIEW

EPA's designation decisions must be set aside if they are arbitrary, capricious, an abuse of discretion, or otherwise inconsistent with the Clean Air Act and implementing regulations. *See* 42 U.S.C. § 7607(d)(9). The "standard of review of Clean Air Act actions tracks standards provided by [the] Administrative Procedure Act, 5 U.S.C. § 706." *Texas v. EPA*, 829 F.3d 405, 425 (5th Cir. 2016) (citing *Luminant Generation Co. v. EPA*, 675 F.3d 917, 925 (5th Cir. 2012)).

Under the Administrative Procedure Act ("APA"), agency action is arbitrary and capricious if "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). To withstand

judicial review under this standard, "EPA needs to articulate only a rational connection between the facts found and the choice made, show that it treated *similar* counties similarly, and demonstrate that it did not run afoul of binding guidance." *Miss. Comm'n on Envtl. Quality v. EPA*, 790 F.3d 138, 171–72 (D.C. Cir. 2015) (emphasis in original; citation and quotation marks omitted). However, a court will not uphold EPA decisions supported by nothing more than conclusory assertions. *See, e.g., In re Bell Petroleum Servs., Inc. v. Sequa Corp.*, 3 F.3d 889, 905 (5th Cir. 1993) (Judicial review "must be based on something more than trust and faith in EPA's experience." (citation and quotation marks omitted)).

ARGUMENT

I. SIERRA CLUB HAS STANDING

Sierra Club has standing challenge EPA's attainment designations for Atascosa, Comal, and Guadalupe Counties. To satisfy Article III's standing requirements, "a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S 167, 180-81 (2000) (citation omitted). "An association has standing to bring suit on behalf of its members when its members would otherwise

have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Id.* at 181.

In the air pollution context, it is clear that "breathing and smelling polluted air" suffices for standing. *Texans United for a Safe Econ. Educ. Fund v. Crown Cent. Petroleum Corp.*, 207 F.3d 789, 792 (5th Cir. 2000); *see also Natural Res. Def. Council v. EPA*, 643 F.3d 311, 317–19 (D.C. Cir. 2011) (environmental plaintiffs established protectable interest due to alleged injuries suffered by members who lived in nonattainment areas, and asserted that local ambient ozone levels had adversely affected their health and forced them to reduce time spent outside).

Sierra Club's members would have standing to sue in their own right to challenge provisions of EPA's ozone designations that do not adequately protect against breathing air that is, by definition, unhealthy to breathe. *See generally* 80 Fed. Reg. 65,292 (ozone NAAQS protect against adverse health effects associated with short- and long-term exposure to ozone levels above the standard). EPA's designation of Atascosa, Comal, and Guadalupe Counties as "attainment" consigns Sierra Club's members in the greater San Antonio area to breathing more polluted air and otherwise experiencing worse air quality than is guaranteed by the Clean Air Act.

Sierra Club's members suffer concrete injuries as a result of EPA's failure to adequately protect against the dangers of ozone pollution in the San Antonio area. Sierra Club members live, work, and recreate throughout the greater San Antonio area,[11] which is impacted by ozone-causing emissions from both Bexar County and the neighboring counties of Atascosa, Comal, and Guadalupe Counties. *See* C.I. No. 0314 at 17-18, 20-21 (demonstrating emissions from Atascosa, Comal, and Guadalupe "subsequently sweep across most of Bexar County to reach the violating monitors"). Ozone pollution from these neighboring counties is harmful not only to Sierra Club members who live and work in Atascosa, Comal, and Guadalupe Counties; it is also harmful to Sierra Club members and their families who live and work in downwind counties such as Bexar County.

The unhealthy levels of air quality in the San Antonio area causes Sierra Club members and their families to experience increased health risks, including increased risks of aggravated respiratory illness and even premature death due to excess ozone pollution. Indeed, Sierra Club members and their families, who live in the San Antonio area and suffer from respiratory ailments, are often forced to stay indoors on poor air quality days, or avoid engaging in outdoor activities like

[11] *See, e.g.*, Burns Decl. ¶¶ 3-11, 13-15 (lifetime member Dr. Terry Burns, M.D. and his wife live in San Antonio and enjoy walking and gardening); McGuire Decl. ¶¶ 2, 7-10 (Sierra Club member and anthropology professor Meredith McGuire lives in Comal County and teaches at Trinity University in San Antonio); Seal Decl. ¶¶ 10-14, 18-20 (Sierra Club member Russell Seal lives in Medina County and enjoys spending time at River Park in San Antonio).

gardening, hiking, or swimming. *See, e.g.*, Burns Decl. ¶¶ 3, 7-11, 13-15; Seal Decl. ¶¶ 10-14, 18; McGuire Decl. ¶¶ 4, 16. These injuries are sufficient to establish harm to a protectable interest. *Texans United*, 207 F.3d at 792; *see also Laidlaw*, 528 U.S. at 183 ("We have held that environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity.'" (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972)).

The causation and redressability elements are also satisfied. First, in the absence of a nonattainment designation, Sierra Club members in and around San Antonio will be subject to an increased risk of harm because EPA's final rule would allow dangerous ozone-causing pollution from Atascosa, Comal, and Guadalupe Counties to continue unabated. C.I. No. 0428 at 21-22 (individual counties surrounding Bexar accounted for up to 8% of ozone contributions to violations of the standard). And if EPA were to designate Atascosa, Comal, or Guadalupe Counties as being in nonattainment, EPA and the State of Texas would be required under the Clean Air Act to reduce ozone-forming pollution from each of those counties, *see* 42 U.S.C. §§ 7502(c), 7511a, thereby redressing the harms to Sierra Club's members' and their families. *See generally Bennett v. Spear*, 520 U.S. 154, 170-71 (1997) (plaintiffs satisfied the "relatively modest" redressability requirement where a finding that the agency had acted illegally would require the

agency to reevaluate its final decision). Any reductions in ozone-forming pollution from counties would not only benefit the communities immediately surrounding those sources, which include Sierra Club members, but those reductions would also reduce harmful NOx, VOC, and associated particulate matter pollution that adversely impacts public health in Bexar County and throughout Texas. C.I. No. 0428 at 17-18; *see generally* C.I. No. 0297.

Finally, Sierra Club has organizational standing because the issues at stake here—protecting clean air and restoring the quality of the natural and human environment—are central to Sierra Club's institutional mission, and this case does not require the participation of any individual members. Fashho Decl. ¶¶ 6-7; *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Brock*, 477 U.S. 274, 287-88 (1986). Thus, Sierra Club has standing to bring this case.

II. VENUE IS PROPER IN THE D.C. CIRCUIT COURT OF APPEALS

The Clean Air Act "evinces a clear congressional intent" to centralize review in the D.C. Circuit of "matters on which national uniformity is desirable." *Texas v. EPA*, No. 10-60961, 2011 WL 710598, at *4 (5th Cir. Feb. 24, 2011). To that end, the Clean Air Act's judicial review provision apportions venue among the circuit courts based on the nature of EPA's action:

> (1) A petition for review of . . . any . . . *nationally applicable regulations promulgated, or final action taken*, by the Administrator

> under this chapter may be filed only in the United States Court of Appeals for the District of Columbia.
>
> (2) A petition for review of . . . any . . . final action of the Administrator under this chapter . . . *which is locally or regionally applicable* may be file only in the United States Court of Appeals for the appropriate circuit.
>
> (3) Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia *if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination.*

42 U.S.C. § 7607(b)(1) (emphasis added). The Clean Air Act's venue provision "facilitat[es] the orderly development of the basic law"; it ensures the D.C. Circuit reviews "matters on which national uniformity is desirable," thereby avoiding "piecemeal review of national issues in the regional circuits, which risks potentially inconsistent results." *Texas v. EPA*, 2011 WL 710598, at *4 (alteration in original; citations omitted).

As explained below, venue over these petitions is appropriate in the D.C. Circuit because the designations are part of an overall "nationally applicable regulation." 42 U.S.C. § 7607(b)(1). Alternatively, the San Antonio Designations, like the ozone designations for every other area of the country, are, on their face, "based on a determination of nationwide scope and effect." *Id.* And EPA's failure

to issue a finding to that effect for the San Antonio area—as it did with respect to every other designation in the country—is arbitrary and capricious.[12]

A. The San Antonio Designations Are Part of a "Nationally Applicable Regulation."

Section 307(b)(1) provides that a petition for review of "nationally applicable regulations" may be filed only in the D.C. Circuit. National applicability turns on the legal impact of the regulation as a whole. *Texas*, 2011 WL 710598, at *3; *ATK Launch Systems, Inc. v. EPA*, 651 F.3d 1194, 1197-98 (10th Cir. 2011) (concluding that EPA's nonattainment designation for two Utah counties were part of a nationally applicable regulation, and transferring the petitions for review to the D.C. Circuit).

Here, the San Antonio Designations are part of the 2015 Ozone Designations Rulemaking, a rulemaking which spans the entire country. The San Antonio Designations are based on the same administrative record, the same methodology, and the same nationally applicable guidance and legal interpretations as the

[12] The motion panel's one-sentence order granting Texas Petitioners' "motion to confirm venue" is not binding on the Court. *See Texas v. EPA*, 706 Fed. App'x 159, 161 (5th Cir. 2017) (in a challenge to nonattainment designations, venue ruling is "without prejudice to reconsideration by the merits panel"); *see also Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511 (2006) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998) (Scalia, J.) (on matters related to the authority of a court to hear a case, courts are not bound to rulings that do not articulate any reasoning).

designations for the rest of the country.[13] All of these designations are organized in the same rulemaking docket and codified in the same section of the Code of Federal Regulations.[14] In promulgating the San Antonio Designations, EPA explicitly recognized these designations "completed [EPA's] initial designations for all areas of the country for the 2015 ozone NAAQS." 83 Fed. Reg. at 35,137. In other words, EPA's ozone designations are *all* part of a "nationally applicable regulation" within the meaning of Section 307(b)(1).

Additionally, and as described above, the ozone designations all employ a common, nationally-applicable statutory and regulatory interpretations, as well as the same five-factor test, analytical approach, and technical assessment. Indeed, the designations all rely on EPA's common interpretations of statutory terms like "contribute to," "nearby" areas, "attainment," and "nonattainment," each of which are central to EPA's overall designation rulemaking. 42 U.S.C. § 7407(d)(1). As EPA recognized in the 2015 ozone designation rulemaking, those terms are not

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[13] *See generally* EPA Docket captioned *Air Quality Designations and Classifications for the 2015 Ozone Standards*, EPA Docket No. EPA-HQ-OAR-2017-0548 (comprised of three final Federal Register Notices designating the entire country under the 2015 standard, 82 Fed. Reg. 54,232 (Nov. 16, 2017), 83 Fed. Reg. 25,776 (June 4, 2018), and 83 Fed. Reg. 35,136 (July 25, 2018); *see also* C.I. No. 0428 at 5 (San Antonio Designations Technical Support Document "based on" same methodology and national guidance as all other areas).

[14] *See* 40 C.F.R. pt. 81. All of the 2015 ozone designations for Texas, including both the designations EPA determined were nationally applicable and the San Antonio Designations, are codified in the same subsection of the Code of Federal Regulations, 40 C.F.R. § 81.344.

defined in the Clean Air Act and thus, EPA "interpret[ed] those ambiguous terms, based on considerations such as the nature of a specific pollutant, the types of sources that may contribute to violations, the form of the relevant NAAQS, and other relevant information." 83 Fed. Reg. at 25,778. Those very same interpretations apply to the San Antonio Designations. And in determining whether a nearby area contributes to nonattainment, EPA applied the same uniform weight of the evidence analysis based on five factors, including air quality data, emissions and emissions related data, meteorological data, geography and topography, and jurisdictional boundaries to every designation in the country. *See* C.I. No. 0428. Although EPA made its ozone designations on a case-by-case basis, the agency was required to evaluate and determine nonattainment consistently throughout the country, applying nationwide guidance and nationally applicable statutory and regulatory interpretations. *Catawba Cnty, N.C. v. EPA*, 571 F.3d 20, 40-41 (D.C. Cir. 2009). Thus, the final designations are individually and collectively part of the same, overarching and nationally applicable regulation.

That EPA issued a separate Federal Register notice for the San Antonio Designations does not change this conclusion. As noted, a petition for review of any "nationally applicable regulations promulgated, *or* final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia." 42 U.S.C. § 7607(b)(1) (emphasis added).

Congress's careful delineation between the terms "nationally applicable regulations" and "final action[s]" must be given effect. Indeed, it is "one of the most basic interpretive canons, that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void, or insignificant." *Exelon Wind 1, LLC v. Nelson*, 766 F.3d 380, 399 (5th Cir. 2014) (citation omitted).

Taking care to interpret Section 307(b)(1) so as not to render any term superfluous, it is clear that "nationally applicable regulations" may be broader than, or composed of multiple, "final action[s]." That conclusion is reinforced by the Administrative Procedure Act, which explicitly contemplates that a "regulation" or "rule" can be composed of multiple "agency actions." *See* 5 U.S.C. § 551(13). And a "rule making" means agency *process* for formulating, amending, or repealing a rule. *Id.* § 551(5) (emphasis added). In this case, there were multiple final actions, but there was only one rulemaking—the 2015 Ozone Designations Rulemaking. Any challenge to that nationally applicable rulemaking must proceed in the D.C. Circuit.[15]

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[15] Comparing the first and second sentences of Section 307(b)(1) further demonstrates that Congress intended for any action promulgated by regulation to be reviewed in the D.C. Circuit. *Compare* sentence 1 (providing for D.C. Circuit review of "any other nationally applicable regulations promulgated, or final action taken") *with* sentence 2 (providing for regional circuit review of "any other final action . . . which is locally or regionally applicable," but failing to authorize review of *regulations* promulgated by EPA).

Texas v. EPA, 706 Fed. App'x 159 (5th Cir. 2017), an unpublished decision, does not require a different result. *See* 5th Cir. R. 47.5.4 ("Unpublished opinions issued on or after January 1, 1996, are not precedent . . . ."). In that case, the Court denied EPA's motion to transfer area designations for the 2010 sulfur dioxide NAAQS. The court stated that "transfer might well be appropriate" if the Texas designations were considered to be part of the same *action* as the designations for the rest of the country. 706 Fed. App'x at 164 (citing *S. Ill. Power Coop. v. EPA*, 863 F. 3d 666 (7th Cir. 2017)). But the plain language of the statute does not support a narrow focus on the *action* under review. As explained, a rulemaking may include *multiple agency actions*, 5 U.S.C. § 551(13), and it is the national applicability of the "*regulation*"—not the action—that is determinative, 42 U.S.C. 7407(b)(1). Here, the San Antonio Designations are unquestionably part of a nationally applicable regulation. *See* 40 C.F.R. pt. 81 (codifying area designations for the entire country). The plain language confirms that review of such a regulation must occur in the D.C. Circuit.

Additionally, separate review of the San Antonio Designations and the rest of the national designations would seriously undermine the "orderly development of the basic law." *Texas v. EPA*, 2011 WL 710598, at *4. All of the designations at issue in the 2015 Ozone Designation Rulemaking apply EPA's interpretations of statutory terms like "contribute to," "nearby" areas, "attainment," and

"nonattainment." And EPA was required to apply these terms in a consistent manner across the country. *See Miss. Comm'n*, 790 F.3d at 171 (EPA must "show that it treated *similar counties* similarly" for its area designations to survive judicial review) (emphasis in original; citation omitted). Some of the challenges to the 2015 Ozone Designation Rulemaking will be based on its unexplained inconsistencies across different designations.

Indeed, in the last ozone-designation case (which was litigated in the D.C. Circuit), the same Texas Petitioners who challenge the San Antonio Designations argued that EPA's nonattainment designation for Wise County, Texas should be invalidated because that designation was allegedly inconsistent with designations for: (1) Orange County and Cattaraugus County, New York, (2) York, Dauphin, and Lawrence Counties in Pennsylvania and Roane Country, Tennessee, and (3) Jasper County, Illinois. *See id.* at 168–74. As Texas's own history of litigating ozone designations shows, final designations for one part of the country cannot be meaningfully reviewed in isolation; comparison of different designations will be necessary to determine if EPA acted arbitrarily or capriciously in a particular designation.

Separate review of the San Antonio Designations and the rest of EPA's nationwide designations would also create a serious risk of inconsistent results, not only across different states *but within the State of Texas*. As explained, EPA

finalized ozone designations for all other parts of Texas as part of a separate Federal Register notice, which is currently subject to petitions for review in the D.C. Circuit.[16] Separate review of different Texas designations creates a significant risk of inconsistent results. For example, if this Court were to rule that EPA should have designated a county in the San Antonio area as nonattainment based on a 5 percent contribution to regional smog, and the D.C. Circuit were to hold that EPA was *not* required to designate a county in the Dallas area as nonattainment despite a 10 percent contribution, EPA would be faced with conflicting rulings and methodological approaches for determining NAAQS attainment in different areas of Texas. Such a result would be wholly contrary to Congress's intent to "facilitate[e] the orderly development of the basic law." *Texas v. EPA*, 2011 WL 710598, at *4.

In sum, the plain language of the Clean Air Act requires D.C. Circuit review of "nationally applicable regulations," including those promulgated through multiple final actions. 42 U.S.C. § 7607(b)(1). And the statutory purposes of centralized review of national issues militate in favor of D.C. Circuit review, to allow for comprehensive review of EPA's process in promulgating the 2015 Ozone Designation Rulemaking, and to prevent inconsistent results across the nation and within the State of Texas.

[16] *See, e.g.*, *Sierra Club v. Wheeler*, No. 18-1214 (D.C. Cir. filed Aug. 3, 2018).

B. EPA Arbitrarily Failed to Publish a Finding That the San Antonio Designations Are Based on a Determination of Nationwide Scope and Effect.

The Clean Air Act "gives the Administrator the discretion to move venue to the D.C. Circuit by publishing a finding declaring the Administrator's belief that the action is based on a determination of nationwide scope or effect." *Texas v. EPA*, 829 F.3d at 419–20. While EPA's venue determination (or lack thereof) is entitled to some deference, it "does not escape review under the APA's arbitrary and capricious standard." *Nat'l Envtl. Dev. Ass'ns Clean Air Project v. EPA*, 891 F.3d 1041, 1053 (D.C. Cir. 2018) (Silberman, J., concurring).

EPA's failure to publish a finding that the San Antonio Designations are "based on" the *same* determinations "of nationwide scope and effect" as every other designation in the country was arbitrary and capricious. Indeed, the Federal Register Notice, the Technical Support Document, and the Response to Comments all make clear that EPA's San Antonio Designations are, in fact, "based on" the very same "core" nationwide statutory and regulatory interpretations, the same five-factor weight-of-evidence analysis, the same national technical guidance, and the same regulatory provisions for measuring, evaluating, and interpreting monitoring and modeling data EPA relied upon in designating every other area of

the country.[17] But instead of treating San Antonio "consistently" with the other designations, as the agency is required to do, *Catawba Cnty*, 571 F.3d at 40-41, EPA arbitrarily and unlawfully declined to make a finding that the San Antonio designations were based on the same determinations of nationwide scope and effect as every other designation in the country. The agency's unexplained and disparate treatment of San Antonio is arbitrary on its face.

EPA's refusal to recognize that the 2015 ozone designations are all based on the *same* "determinations of nationwide scope and effect" is also inconsistent with EPA's past practice,[18] and precedent concluding that similar individual area designations under the NAAQS should be reviewed in the D.C. Circuit.[19] And EPA's failure to explain its departure from that practice and precedent is arbitrary.

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[17] C.I. No. 0428 at 4-5 (San Antonio Designations "based on" same statutory interpretation of "contributes to" and "nearby," same "weight-of-evidence of the five factors recommended in the EPA's ozone designations guidance," and same considerations such as the nature of a specific pollutant, the types of sources that may contribute to violations, the form of the relevant NAAQS, and other relevant information); *id.* at 6 (basing designations on national regulations for evaluating monitoring data); *id.* at 8 (nearby counties evaluated "based on the weight-of-evidence of the five factors" described in national guidance).

[18] *See, e.g.*, 81 Fed. Reg. 89,870 (Dec. 13, 2016) (finding that area designations under the National Ambient Air Quality Standard for sulfur dioxide were based on a determination of nationwide scope and effect).

[19] *See, e.g., ATK Launch Systems*, 651 F.3d 1197-98 (nonattainment designation for discrete portions of just two Utah counties were part of a nationally applicable regulation and must be reviewed in the D.C. Circuit); *Miss. Comm'n*, 790 F.3d at 150 (D.C. Circuit reviewing EPA's area designations under the 2008 ozone NAAQS); *Pa. Dep't of Envtl. Prot. v. EPA*, 429 F.3d 1125 (D.C. Cir. 2005) (reviewing challenges by two states, Pennsylvania and Delaware, to EPA's designations rule for the 1997 8-hour ozone NAAQS).

FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009) (an agency must at least "display awareness that it *is* changing position" and "show that there are good reasons for the new policy.") (emphasis in original).

III. BEXAR COUNTY WAS PROPERLY DESIGNATED AS NONATTAINMENT

There can be no serious dispute that EPA's decision to designate Bexar County as a nonattainment area was correct. EPA's longstanding interpretation of the Clean Air Act—applied uniformly in this rulemaking—is that the agency "is *required* to designate as nonattainment . . . areas with . . . monitors that are violating" the relevant NAAQS. C.I. No. 0428 at 2 (emphasis added). Texas's own certified monitoring data demonstrates that Bexar County was violating the 2015 ozone NAAQS. *Id.* at 6-7; see also C.I. 0046, App. B (Sept. 16, 2016 letter from Gov. Greg Abbott to Janet G. McCabe). Indeed, Texas initially recommended that Bexar County be designated as nonattainment. *Id.* Although Texas had multiple opportunities to submit additional information showing that Bexar County's monitors were in attainment for the NAAQS, it never did so. Accordingly, EPA's Bexar County designation was mandated by the available data and the clear requirements of the Clean Air Act.

Indeed, if EPA had refused to designate Bexar County, its decision would have been flagrantly unlawful. 42 U.S.C. § 7407(d)(1)(A)(i). To withstand arbitrariness review, EPA must, among other things, show that it "treated similar

counties similarly." *Miss. Comm'n*, 790 F.3d at 171 (internal citations omitted). Every area of country that had a violating monitor received a non-attainment designation.[20] The agency's longstanding practice is to designate every area of the country that has a violating monitor, and we are not aware of any court decision so much as suggesting that EPA has discretion to avoid designating such an area. According special treatment to San Antonio—without any justification—would have been a textbook example of arbitrary and capricious decisionmaking.

IV. EPA UNLAWFULLY FAILED TO DESIGNATE ATASCOSA, COMAL, AND GUADALUPE COUNTIES AS NONATTAINMENT.

Section 107(d) of the Clean Air Act "explicitly requires that the EPA designate as nonattainment not only the area that is violating the pertinent standard, but also those nearby areas that *contribute* to the violation in the violating area." C.I. No. 0061 at 5 (emphasis added) (citing 42 U.S.C. § 7407(d)(1)(A)(i)). As noted, Bexar County monitors demonstrate that the area is not meeting the ozone standard. Consistent with its national guidance, EPA then conducted a "case-by-case evaluation" of the nearby counties, including Atascosa, Comal, and Guadalupe, to determine whether those counties contributed to violations of the standard in Bexar. C.I. No. 0061 at 5. Based on an evaluation of by five factors—

[20] There is an exception: certain areas of the country which had violating monitors were not designated as nonattainment if EPA approved an exceptional event petition under 42 U.S.C. § 7619. Texas did not submit such a petition for San Antonio.

air quality data, emissions and emissions-related data, meteorology, geography/topography, and jurisdictional boundaries—EPA designated those counties as attainment or unclassifiable. C.I. No. 0428 at 2-3, 20-22.

EPA's approach to Atascosa, Comal, and Guadalupe Counties was unlawful and arbitrary for at least two reasons. First, the agency's interpretation of "contribution" is inconsistent with the text and purpose of the Clean Air Act, and departs, without explanation, from the agency's previous interpretations of the term. Second, the agency failed to examine the available information and articulate a rational explanation for its decision.

A. EPA's Interpretation of "Contribution" is Arbitrarily Inconsistent with the Agency's Previous Interpretations.

Although courts have upheld EPA's use of a multi-factor test for determining downwind nonattainment where it "lacks a definite 'threshold' or clear line of demarcation,'" *Catawba Cnty*, 571 F.3d at 39, there are limits to the agency's discretion. Where, as here, EPA has established a clear numeric threshold for "significant" downwind contribution to nonattainment in analogous circumstances, the agency must provide a rational explanation for its departure from that approach. *See FCC v. Fox Television Stations,* 556 U.S. at 515 (when an agency departs from an interpretation, "the agency must at least 'display awareness that it *is* changing position" and "show that there are good reasons for the new policy") (emphasis in original).

In both the Designation Guidance for this rulemaking and the final regulation, EPA has arbitrarily failed to acknowledge—let alone provide a rational explanation—for its departure from the use of a numeric threshold for determining downwind contribution to nonattainment in analogous circumstances. Specifically, in interpreting the related "good neighbor" provisions of the Clean Air Act, 42 U.S.C. § 7410(a)(2)(D), EPA has consistently found that pollution impacts greater than one percent of the applicable NAAQS constitute a "significant" contribution to downwind nonattainment.[21] The Clean Air Act's good neighbor provision, like the nonattainment designation provisions at issue here, "requires EPA to seek downwind attainment of NAAQS," *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 523 (2014), by prohibiting "any source or other type of emissions activity within the state from emitting any air pollutant in amounts which will . . . *contribute significantly* to nonattainment . . . , or interfere with maintenance," of any national air quality standard. 42 U.S.C. § 7410(a)(2)(D)(i) (emphasis added). Indeed, the overriding purpose of both the good neighbor provision and the

[21] *See* 76 Fed. Reg. 48,208, 48,237 (Aug. 8, 2011) (final Cross State Air Pollution Rule adopting a one percent threshold for determining whether an upwind state "significantly contributes" to nonattainment); 75 Fed. Reg. 45,210, 45,232-37 (Aug. 2, 2010) (proposed Cross-State Air Pollution Rule explaining application of one percent significance threshold); 70 Fed. Reg. 25,162, 25,191-93 (May 12, 2005) (Clean Air Interstate Rule adopting a one percent threshold for determining whether an upwind state "significantly contributes" to nonattainment); 63 Fed. Reg. 57,356, 57379-80 (Oct. 27, 1998) (NOx SIP Call adopting same percentage threshold).

designation provisions at issue here is to assure attainment and maintenance of the NAAQS throughout the state. *Compare* 42 U.S.C. § 7407(a), *with id.* § 7410(a)(1). And in upholding EPA's one percent numeric threshold in the good neighbor context, the Supreme Court observed that, in evaluating downwind contribution to nonattainment, EPA "has a statutory obligation to avoid 'under-control,' *i.e.*, to maximize achievement of attainment downwind." *EME Homer City,* 572 U.S. at 523. EPA has arbitrarily failed to explain why it is not appropriate to use a similar numeric threshold in evaluating whether a nearby area contributes to violations of the NAAQS.

EPA's interpretation of the term "contribution" is inconsistent, not only with the agency's interpretation of analogous statutory provisions, but with the structure of the Clean Air Act. In crafting Section 107(d), Congress purposefully declined to use the modifier "significantly," which appears in the closely-related provisions of the Act. *Compare* 42 U.S.C. § 7407(d)(1)(A)(i) (an area must be designated as nonattainment if it "contributes to" nonattainment in a "nearby" area), *with* § 7410(a)(2)(D)(i)(I) (state implementation plan must prohibit emissions that will "contribute *significantly* to nonattainment in . . . any other State") (emphasis added), *and* § 7426(a)(1)(B) (providing for notification of nearby states if a source is being constructed that "may *significantly* contribute" to violation of the NAAQS

in such other state). Congress clearly intended for a "contribution" for purposes of Section 107(d) to mean something *less than* a "significant contribution."

EPA has failed to reconcile its inconsistent interpretation and application of the statutory term "contribution." Nor has the agency explained why pollution contributions above one percent of the NAAQS are deemed "significant," and must therefore be controlled for the purposes of assuring downwind attainment in the good neighbor, while the same numeric level of pollution contribution escapes control when determining which areas to designate as nonattainment. EPA's interpretation of contribution is arbitrary, and fails to satisfy EPA's fundamental "statutory obligation to avoid 'under-control,' *i.e.,* to maximize achievement of attainment downwind." *EME Homer City*, 572 U.S. at 523.

Finally, EPA's approach to Atascosa, Comal, and Guadalupe Counties is arbitrarily inconsistent with the agency's nonattainment designations for other parts of Texas under the 2008 ozone standard. In designating Wise County, Texas as being in nonattainment with the 2008 ozone NAAQS, for example, EPA relied on source-apportionment modeling demonstrating that Wise County emissions contributed more than one percent of the ozone impacts to violating monitors in the Dallas Fort Worth area. Although Wise County did not have any regulatory monitors of its own, the D.C. Circuit upheld EPA's nonattainment designation based, in part, on modeled pollution contributions to nearby monitors violating the

standard. *Miss Comm'n*, 790 F.3d at 168. Given the availability of the same kind of source-apportionment modeling for San Antonio that EPA relied on to designate Wise County, EPA's departure from its previous one-percent threshold is all the more difficult to justify.

In sum, EPA has consistently found that pollution impacts greater than one percent of the applicable NAAQS are "significantly" contributing to nonattainment. If EPA had consistently applied that interpretation, the agency would have designated Atascosa, Comal, and Guadalupe County as nonattainment (in addition to Bexar) because Texas's own data demonstrates that those adjacent counties exceed EPA's one-percent contribution threshold with respect to the NAAQS violations in Bexar County. EPA failure to provide a rational explanation—or even acknowledge—its inconsistent interpretation and application of the statutory term "contribution" renders its designations of Atascosa, Comal, and Guadalupe Counties arbitrary and capricious. *FCC v. Fox Television Stations,* 556 U.S. at 515.

B. EPA Failed to Examine the Available Information and Articulate a Rational Explanation for its Decision.

Even if EPA may ignore its previous interpretations of the specific level of pollution "contribution" that must controlled, EPA failed to articulate a rational connection between the facts in the record and its decision not to designate

Atascosa, Comal, and Guadalupe Counties as nonattainment. *Miss. Comm'n*, 790 F.3d at 171–72. First, EPA cannot refuse to designate those counties as "contributing" merely because they are responsible for less pollution "relative" to Bexar County. C.I. No. 0428 at 22. Indeed, the term contribute does not require strict causation. *Catawba Cnty.*, 571 F.3d at 39. Here, EPA's technical support document demonstrates that those three counties are responsible for approximately a third of the total ozone precursor emissions in the San Antonio area. EPA's own HYSPLIT analysis demonstrates that emissions from those counties travel to and contribute to the violating monitors in Bexar County. C.I. No. 0428 at 17-18, 20-22. Moreover, Texas's own modeling data demonstrates that emissions from each of those counties contribute as much as 8% of the ozone pollution to violating monitors, *id.* at 21-22—well above EPA's one-percent threshold for "significant" contribution. In short, those counties clearly "exacerbate" violations of the ozone standard in Bexar County, and must therefore be designated as nonattainment. *Catawba Cnty.*, 571 F.3d at 39.

Second, EPA's analysis of these counties ignored an important aspect of the problem. *State Farm*, 463 U.S. at 49. While the typical "contribution" analysis involves one county that is attaining the standard and a "nearby" county that is not, EPA simply does not have air quality data for Atascosa, Comal, and Guadalupe Counties. C.I. No. 0428 at 7 (Table 2a). In other words, Atascosa, Comal, and

Guadalupe Counties may *themselves* be experiencing ozone pollution in excess of the 2015 NAAQS. While the Clean Air Act does not require EPA to designate as non-attainment areas for which it lacks data, it unreasonable for EPA to ignore the possibility that an area's air is unsafe in deciding whether to list it as non-attainment. Here, EPA did exactly that.[22]

Third, EPA set the bar for "contribution" improperly high. The agency found that each of these counties was responsible for at least 10% of the NOx and/or VOC emissions in the area of analysis; together, they were responsible for more than 30% of area NOx and VOC emissions.[23] HYSPLIT analysis is consistent with pollution transport from these counties to the violating monitors. C.I. No. 0428 at 21. Keeping in mind that Congress did not intend to require a "significant contribution" under Section 107(d), EPA's decision to disregard the contributions of Atascosa, Comal, and Guadalupe Counties was unlawful.

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[22] In its analysis of Atascosa County, EPA noted that the Calaveras Lake Monitor, located at the southeastern edge of Bexar County, is meeting the 2015 ozone NAAQS. C.I. No. 0428 at 21. Numerous HYSPLIT back trajectories, however, indicate that pollution from Atascosa County bypasses the Calaveras Lake Monitor. Even if this did suggest that Atascosa (located to the south of Bexar County) is also attaining the standard, it would not support any such inference with respect to Comal and Guadalupe Counties, which lie north-northeast of Bexar County.

[23] Specifically, EPA found that Atascosa emits 12% of regional NOx and 15% of regional VOCs, Comal emits 11.3% of regional NOx and 6% of the VOCs, and Guadalupe emits 7% of the NOx and 10% of regional VOCs. C.I. No. 0428 at 10 (Table 3).

Finally, the other factors indicate that EPA should have designated Atascosa, Comal, and Guadalupe Counties as contributing counties. About a third of each county's residents commute to Bexar County. *Id.* at 15 (Table 5). The counties are experiencing a combined growth rate of approximately 13%; two percent higher than Bexar County's growth rate. *Id.* at 12 (Table 4). EPA previously grouped Bexar, Comal, and Guadalupe counties together in a single nonattainment area for purposes of the 1997 ozone NAAQS, 69 Fed. Reg. 23,858 (Apr. 30, 2004), and all four of the counties at issue in this case fall within the boundaries of the Alamo Area Council of Governments regional planning organization. C.I. No. 0428 at 19. All of these factors indicate that EPA should have designated Atascosa, Comal, and Guadalupe Counties as contributing counties.

CONCLUSION

For the foregoing reasons, Sierra Club's petition for review should be granted.

Respectfully submitted this 26th day of November, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on November 26, 2018, the foregoing was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system, which will send notification of said filing to the attorneys of the record who have consented to electronic service.

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CERTIFICATIONS UNDER ECF FILING STANDARDS AND CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

Pursuant to paragraph A(6) of this Court's ECF Filing Standards, I hereby certify that (1) required privacy redactions have been made, 5th Cir. R. 25.2.13; (2) the electronic submission is an exact copy of the paper document, 5th Cir. R.25.2.1; and (3) the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

I certify that this brief contains 10,475 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 5th Cir. R. 32.2 and as counted by counsel's word processing system, and thus complies with the applicable word limit established in the Order granting the briefing schedule which was entered on October 26, 2018 (ECF No. 00514699423).

Dated: November 26, 2018

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